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IN THE

Supreme Court of the United States

1974

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JOSEPH ROLAND ROGER SAVARD,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit

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Joseph Roland Roger Savard respectfully petitions this Honorable Court for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this cause on May 2, 1974.

OPINION BELOW

The opinion of the Court of Appeals, reported below at 493 F.2d 490 (5th Cir. 1974), is set forth in the Appendix.

JURISDICTION

The May 2, 1974 judgment by the Court of Appeals became final when it denied a petition for rehearing on June 11, 1974; this petition for certiorari was filed within thirty (30) days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Where an indictment under 8 U.S.C. §1324 (a) (2) charges, in the words of the statute, that the defendant knew the alien transported was in the United States "in violation of law," but it does not set forth any specific facts showing that violation or even cite a statute or regulation violated by that alien, can the indictment be cured at the close of the government's case by an open court disclosure of the statute violated by that alien, followed by a new trial?

2. (a) Is an "entry" by an alien, in violation of 8 U.S.C. §1325, complete when the border guard removes official restraint by waving the alien through the check point?

(b) If an "entry" is complete upon passing through the check point, how can such an entry be 'furthered,' within the contemplation of 8 U.S.C. §1324 (a) (2), by transportation which begins at least five miles below the border?

(c) If an "entry" is complete upon passing through the border check point, was it error to refuse a supplemental instruction defining that word, where the request was made immediately after the trial court gave a detailed supplemental charge explaining to the jury for the first time the phrase, 'in furtherance of a violation?'

STATUES INVOLVED

1. 8 U.S.C. §1324 (a):

"Any person, including the owner, operator, pilot, master, commanding officer, agent, or consignee of any means of transportation who –

. . .

"(2) knowing that he is in the United States in violation of law, and knowing or having reasonable grounds to believe that his last entry into the United States occurred less than three years prior thereto, transports, or moves, or attempts to transport or move, within the United States by means of transportation or otherwise, in furtherance of such violation of law;

. . .

"Any alien, including an alien crewman, not duly admitted by an immigration officer or not lawfully entitled to enter

or reside within the United States under the terms of this chapter or any other law relating to the immigration or expulsion of aliens, shall be guilty of a felony . . ."

2. 8 U.S.C. § 1325:

"Any alien who (1) enters the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers, or (3) obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact, shall, for the first commission of any such offenses, be guilty of a misdemeanor . . ."

STATEMENT OF THE CASE

On May 17, 1973 the United States filed an indictment against petitioner charging in count one[1] thereof that on or about November 28, 1972 he transported an alien, one Jean Marc Levesque, from Plattsburg, New York, to Orange County, Florida. This count further alleged that Levesque was not duly admitted by an immigration officer, that he was not lawfully entitled to enter and reside in the United States, that petitioner then knew that Levesque was in the United States in "violation of law" and that the transportation was in order to further such violation. The indictment did not set forth any facts or citation indicating the specific nature of the offense by Levesque.

At trial Levesque testified that by prior understanding with petitioner, he came across the United States-Canadian border at Champlain, New York, in a car driven by Savard's brother-in-law. (Petitioner crossed the border in advance in a separate vehicle.) At the border, the brother-in-law told the guard, on behalf of all occupants including Levesque, that they were going to Plattsburg for the day, to go swimming and drink beer. On the highway outside of Plattsburg – at least five miles below the border – Levesque transferred to petitioner's car and rode with him to Orange County, Florida. Shortly thereafter Levesque went to work picking oranges. Petitioner's testimony was not materially different, although he could not, of course, testify as to what occurred at the border.

1. Two other counts were disposed of in the first trial and are not here involved.

After the United States rested, it announced, for the first time, that the violation by Levesque was illegal entry under 8 U.S.C. §1325. Petitioner's post-trial motions for acquittal and new trial set forth this late disclosure as one of its grounds. The District Court denied the motion for acquittal but granted a new trial on the ground that

> ". . . the Government did not disclose to the defendant – or to the Court – the basis for the allegation in Count One that the alien named therein was 'in violation of law' until the close of the government's case . . ."

At the commencement of the second trial, petitioner moved in open court to dismiss the indictment on the ground that it contained "no indiction" of what Levesque had done that was "in violation of the law," making it "impossible . . . to tell what facts were before the Grand Jury . . ." Whereupon this colloquy ensued:

"THE COURT:
"Well, the man that signed this Indictment is now trying the case. The last time the attorney for the government had been somebody else and it was somebody else's Indictment. This time Mr. Jontz has his own Indictment so we will hear from Mr. Jontz.

"MR. DYER:
"They were only a telephone length away during the pretrial period.

"MR. JONTZ:
"During the first trial Mr. Snyder called me – I believe I can state this, and asked me what the Statute was that was involved as there was some question about it. I said that I thought it was abundantly clear, everybody knew from the outset it was 1325. I presented this case along with the witnesses before the Grand Jury and I can specifically say that at that time they were told that the government's theory in the case was that a Mr. Levesque was improperly in the country by reason of willful, false and misleading statements made at the border and Mr. Savard knew that when he transported him down there.

"THE COURT:
"It doesn't say so in the Indictment.

"MR. JONTZ:
"That's correct. I think that was probably a proper subject for bill of particulars and Your Honor said that we complied with the bill of particulars too late and it is my understanding that is the ground for the granting of the motion for a new trial.

"THE COURT:
"That's right and the order so states.

"MR. JONTZ:
"I would so state – I do state here as an officer of the Court that this theory was presented to the Grand Jury.

"MR. DYER:
"I was not present, Your Honor, and I don't know if there were any minutes kept but I move to strike what he said to the Grand Jury.

"THE COURT:
"Well, the defendant and his counsel are both well aware now of the government's contention as we start this new trial and the slate is clean."

Shortly after the jury instructions were read, the foreman sent a written request to the court: "Please define precisely 'furtherance of a violation.'" After this new instruction, and after the jury was taken out, petitioner requested a qualifying instruction that as a "matter of judicial interpretation the offense [of illegal entry under § 1325] is complete when . . . [the alien] passes the border by use of material misstatement or material omission . . . because . . . without that they are in a very difficult position in understanding the furtherance of that particular violation." The court denied the request, saying, "The way the case was presented I don't know any other way to present the furtherance but you may have a point."

The Court of Appeals affirmed the judgment of conviction.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH A DECISION OF THIS COURT AND A DECISION OF ANOTHER COURT OF APPEALS AS TO THE SUFFICIENCY OF INDICTMENTS CONTAINING SUCH PHRASES AS "CONTRARY TO LAW" AND "IN VIOLATION OF LAW."

In the Court below petitioner relied upon *Babb* v. *United States*, 218 F.2d 538 (5th Cir. 1955). The opinion below did not cite *Babb*. Petitioner submits that the decision by the Court of Appeals conflicts with these cases:

(1) *Keck* v. *United States*, 172 U.S. 434 (1899). Count one of the indictment charged that Keck had unlawfully imported and attempted to import diamonds of a stated value into the port of Philadelphia, "'contrary to law . . .'" *Id.* at 437. This Court held as to count one that

> "The words, 'Contrary to law,' contained in the statute clearly relate to legal provisions not found in section 3082 itself, but we look in vain in the count for any indication of what was relied on as violative of the statutory regulations concerning the importation of merchandise." *Ibid.*

This aspect of *Keck* has not been questioned by subsequent decisions of this Court.

(2) *Steiner* v. *United States*, 229 F.2d 745 (9th Cir. 1956). Substantive counts 8, 9, 10 and 11 charged defendants with transporting psittacine birds ("merchandise") "knowing the same to have been imported into the United States contrary to law." *Id.* at 748. The Ninth Circuit, citing *Keck* and *Babb*, *supra*, held that these substantive counts were insufficient to charge an offense because each count "failed to state what law . . . the importation mentioned therein was contrary, or in what respect such importation was contrary to law." 229 F.2d at 748. The Ninth Circuit said the defects in these counts "could not have been cured by a bill of particulars. It is therefore immaterial that appellants did not move for such a bill." 229 F.2d at 748.

Thus, in *Steiner*, the indictment did not disclose any specific facts known to the defendant that explained why the mere presence of the birds in the United States was known by defendant to be contrary to law. In the case at bar, the indictment did not state what Levesque had done – or intended to do – that was known by petitioner to make Levesque's presence in the United States "in violation of law." The indictment does not even charge that petitioner knew that Levesque was not duly admitted by an immigration officer. It certainly does not hint at the specific facts of Levesque's violation.

The trial court in the case at bar believed that disclosure at the end of the Government's case of the statute involved in Levesque's offense, 8 U.S.C. § 1325, came too late to cure the prejudice to petitioner. The actual reasoning of the Court of Appeals is unclear, because although it alluded to a bill of particulars, none was in fact filed. The Court of Appeals, at the very least, held that petitioner's indictment was not fatally defective, *i.e.*, could be cured with an oral bill of particulars. To this extent, it conflicts with *Steiner*, where the Ninth Circuit held that the phrase, "contrary to law," rendered the indictment so defective it could not have been cured by a bill of particulars.

The opinion below conflicts with at least three opinions by the Fifth Circuit itself. In *Babb* v. *United States*, 218 F.2d 538 (5th Cir. 1955), the indictment charged defendants with transporting certain merchandise, to wit, eight Charolaise Cattle, "knowing the same to have been importated and brought into the United States contrary to law." *Id.* at 539. Notwithstanding a bill of particulars, to which was attached ten pages of regulations, the Court held (1) that the indictment was deficient because there were no references to a specific statutory violation encompassed by the phrase "contrary to law," and (2) the defective indictment could not be cured by any bill of particulars. *Ibid.* The Court cited *Keck* and *Sutton* v. *United States*, 157 F.2d 661 (5th Cir. 1946), on the need to allege facts and a statutory violation to support the otherwise meaningless phrase, "contrary to law." 218 F.2d at 540-41. " . . .[I]t is not enough to say that they were imported or brought in 'contrary to law." *Id.* at 541.

In *Van Liew* v. *United States*, 321 F.2d 664 (5th Cir. 1963), count one of the indictment charged that defendants conspired to introduce into interstate commerce a food "which was misbranded" within the meaning of 21 U.S.C. § 343 (a), (b), (i) (2).

Notwithstanding identification of the statute involved, the Court held that the indictment did not sufficiently apprise defendants of the specific offense with which they were charged. The Court noted that *Russell* v. *United States,* 369 U.S. 749, 770 (1962), prohibited courts – or prosecuting attorneys – from making a "subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment . . ." 321 F.2d at 669. The Court said that the provisions of the sections of the statute cited in the indictment could charge eleven possible crimes. In holding that it is the grand jury which must select the offense (based on the evidence presented to it), the Court said that if the prosecutor could make the "choice of one or more out of many unidentified crimes . . . then presentment by a Grand Jury will have become a useless, historic ritual." *Id.* at 672. Yet, this is just what the trial court allowed the prosecutor to do in the case at bar. Section 1325 of Title 8 contains three to five separate possible offenses; but not even this section as a whole was cited in petitioner's indictment.

In *Sutton* v. *United States,* 157 F.2d 661 (5th Cir. 1946), the Court reversed a conviction upon an indictment which charged defendant with possession and control of rationed sugar "'in violation of Second Revised Ration Order No. 3 and General Ration Order No. 8, as amended.'" *Id.* at 663. The Court said that the "phrase just quoted was not an allegation of fact but a legal conclusion of the pleader . . ." *Id.* at 664.

The Court below said that "An almost identical situation existed in Bland v. United States, 299 F.2d 105 (5th Cir. 1962). That decision controls." The *Bland* indictment charged that defendants violated 8 U.S.C. §1324 (a) (1) by flying into the United States two aliens not duly admitted and not entitled to reside in the United States. 299 F.2d at 106. *Bland* seems distinguishable because there the defendants, themselves, were charged with flying the aliens into the country; therefore, the defendants knew that the aliens had not been duly admitted. In the case at bar, Levesque went through a regular border station and petitioner's transportation began several miles south of that station.

The statutes and regulations governing aliens are complex and voluminous. It was a complete surprise that Levesque's offense turned out to be §1325. The statutes and regulations cover length of stays, students, unskilled workers (Levesque), etc.

The case at bar appears to be the first case under 8 U.S.C. §1324 (a) (2) where the vagueness of the mere phrase, "in vio-

lation of law," has been challenged (and even this challenge is not apparent from the text of the opinion below). But the failure factually to identify the offense of the alien transported, with statutory citation, must surely be a problem in scores of other cases. The statutes and regulations are so complex, and the situations under which transportation takes place are so varied, that defendants indicted under 8 U.S.C. § 1324 (a) (2) will suffer loss of their Sixth Amendment rights if the simplistic rationale of *Bland* displaces the traditional tests of *Keck, Steiner, Babb, Sutton* and *Van Liew, supra.* Strangely, there is no indication that this concern has even been raised in cases such as *Melendrez-Rodriguez* v. *United States,* 441 F.2d 1109 (9th Cir. 1971); *Martinez-Quiroz* v. *United States,* 210 F.2d 763, 764 n.2 (9th Cir. 1954); *Herrera* v. *United States,* 208 F.2d 215, 216 (9th Cir. 1953); and *United States* v. *Quinonez-Alavarado,* 317 F. Supp. 1344 (W.D. Tex. 1970) (where the court set aside its own finding of guilt on the ground that the Government failed to prove that the defendant knew the alien was in this country in violation of law).

II. THE OPINION OF THE LOWER COURT SANCTIONS A DEFINITION OF "ENTRY" IN CONFLICT WITH DECISIONS FROM OTHER COURTS OF APPEALS.

Once the trial court gave a supplemental instruction defining for the first time the phrase, 'furtherance of a violation,' the logical question was how an entry at the border could be furthered by transportation beginning at least five miles south of that border. Nevertheless, the trial court denied a qualifying instruction that the offense by the alien was "as a matter of judicial interpretation complete . . . when he passes the border by the use of material misstatement or material omission . . ." The opinion below did not comment on the refusal to give this supplementary instruction, but did uphold the trial court's denial of another charge on general intent.

Several decisions hold that an "entry" occurs when the alien is physically in this country and official restraint has been lifted, *e.g.,* by an immigration officer granting leave for crew members of a foreign ship to go ashore. See *United States* v. *Vasilatos,* 209 F.2d 195, 197 (3d Cir. 1954):

> "In any event, the view has prevailed with respect to arrivals of the type here involved that freedom from official restraint must be added to physical presence before entry is accomplished."

To the same effect are *Lazarescu* v. *United States,* 199 F.2d 898, 900 (4th Cir. 1952); *United States* v. *Mallides,* 339 F. Supp. 1 (S.D. Cal. 1972), *rev'd on other grounds,* 473 F.2d 859 (9th Cir. 1973); and *In re Dubbiosi,* 191 F. Supp. 65 (E.D. Va. 1961).

Apparently, *United States* v. *Mallides,* 229 F. Supp. 1 (S.D. Cal. 1972), is the only decision that has discussed this judicial definition of 'entry' in the light of a situation even remotely analogous to that in the case at bar. In *Mallides* the indictment charged aiding and assisting an illegal entry under 8 U.S.C. §1325. Defendant met the aliens at San Diego and drove them to Oceanside, California. The District Court, in reviewing a conviction by the magistrate, concluded "that the entry had been accomplished prior to the time that appellant met the aliens. Consequently, the conviction cannot be sustained under this theory." *Id.* at 4. However, the conviction was sustained on the theory that Mallides' action "was part and parcel to a plan to aid and assist the entry of aliens into this country, his duty being to await the arrival of the aliens in San Diego and then transport them further into the interior." *Ibid.*

Had either the trial court or the Court below applied the above judicial definition of "entry" as was done in *Mallides,* the conviction would have been set aside, for there is no logical way to further an entry, which was complete at the Champlain border station, by transportation beginning five miles down the highway.

Since unlawful entry, in violation of 8 U.S.C. §1325, was the offense committed by the alien (which offense petitioner allegedly furthered), it would seem that petitioner was entitled to (a) the qualifying charge defining entry, or (b) a review of the evidence measured against the standard judicial definition of that word. (The statutory definition of entry at 8 U.S.C. §1101 (a) (13) does little to advance the problem.)

CONCLUSION

The tests applied to indictments charging transportation of cattle or psittacine birds in this country "contrary to law" should not be more favorable to defendants than the tests applied to indictments charging transportation of aliens in this country "in violation of law." But this unfortunate dichotomy may continue unless this Court issues its writ of certiorari to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

/s/ ROBERT DYER

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished by first class mail this 27th day of July 1974 to John L. Briggs, Esquire, Post Office Box 2593, Orlando, Florida 32802, and three copies by air mail to the Solicitor General, Department of Justice, Washington, D.C. 20530.

/s/ ROBERT DYER

Robert Dyer

APPENDIX

UNITED STATES of America, Plaintiff-Appellee,

v.

Joseph Roland Roger SAVARD, Defendant-Appellant.

No. 73-2926.

United States Court of Appeals,
Fifth Circuit.

May 2, 1974.

Appeal from the United States District Court for the Middle District of Florida.

Before BROWN, Chief Judge, and AINSWORTH and MORGAN, Circuit Judges.

PER CURIAM:

A jury found Savard guilty of violating 8 U.S.C. § 1324 (a)(2),[1] and he was sentenced to one year in prison. All but three months was suspended. This appeal followed.

A Canadian citizen with a permanent United States work permit, Savard was chief of a fruit picking crew in Florida. His pay consisted of a percentage of the profits made from the picked fruit. Gene Mark Levesque is a Canadian citizen without a United States work permit of any type. While in Canada, Savard and Levesque agreed that Levesque would cross into the United States, meet Savard, who would then take Levesque to Florida to work. This was done, Savard carrying Levesque's baggage across the border and Levesque riding with friends so as not to arouse suspicion. In the United States they met and proceeded south. Upon arrival in Florida they were apprehended.

1. 8 U.S.C. § 1324(a)(2) provides:
(a) Any person, including the owner, operator, pilot, master, commanding officer, agent, or consignee of any means of transportation who –

. . . .

(2) knowing that he is in the United States in violation of law, and knowing or having reasonable grounds to believe that his last entry into the United Staes occurred less than three years prior thereto, transports, or moves, or attempts to transport or move, within the United States by means of transportation or otherwise, in furtherance of such violation of law;

. . . .

any alien, including an alien crewman, not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States under the terms of this chapter or any other law relating to the immigration or expulsion of aliens, shall be guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding $2,000 or by imprisonment for a term not exceeding five years, or both, for each alien in respect to whom any violation of this subsection occurs: Provided, however, That for the purposes of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring.

There are five contentions on appeal. First, the indictment should have been dismissed because it did not allege essential facts with requisite particularity to constitute an offense under the statute. We find that the indictment, plus the bill of particulars, properly advised the appellant of the offense charged. An almost identical situation existed in Bland v. United States, 299 F.2d 105 (5th Cir. 1962). That decision controls. See, Banderas-Aguirre v. United States, 474 F.2d 985 (5th Cir. 1973). See also, United States v. Duran, 411 F.2d 275 (5th Cir. 1969) and Hayes v. United States, 407 F.2d 189 (5th Cir. 1969).

Second, appellant challenges the sufficiency of the evidence of the violation. A thorough analysis of this statute, as was done in Herrera v. United States, 208 F.2d 215 (9th Cir. 1953), cert. den., 347 U.S. 927, 74 S.Ct. 529, 98 L.Ed. 1080 (1953), combined with a complete review of the evidence convinces this court that sufficient evidence existed to justify a guilty verdict. Appellant's fourth contention of error is also controlled by our

finding as to this second allegation.[2] Furthermore, the trial record demonstrates on its face that appellant's allegation as to Levesque's inability to communicate is meritless.

Last, it is urged that the tiral court erred in the giving of a supplemental charge. After the jury retired to deliberate, a note was sent to the court requesting a more precise definition of "furtherance of a violation." The request was granted. The total elapsed time from the jury's rising to go deliberate and its being reseated to hear the supplemental instructions was 34 minutes.[3] Appellant now asserts that because of this time lapse, favorable and unfavorable instructions were not kept in equal focus. *Bland, supra,* and Perez v. United States, 297 F.2d 12 (5th Cir. 1961) are relied on to support this argument. In *Bland* the elapsed time was four hours and in *Perez* a minimum of 12 hours.

The trial court apparently determined that the jury had in effect deliberated no more than ten minutes. Even then, the court instructed them not to give unequal weight to any of the instructions. We conclude that under these facts no error occurred. The lower court is

Affirmed.

2. Appellant's fourth contention was that the evidence was not sufficient for the case to go to the jury.

3. Appellant and appellee apparently miscalculated the time in their briefs.